FOR ARGUMENT

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 78-5384

DAVID SANDSTROM,
Petitioner,

vs.

STATE OF MONTANA,
Respondent.

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

—o—

QUESTION PRESENTED

The question presented, as set forth in petitioner's brief, raises the following subsidiary issue:

> Did petitioner's admission of the requisite criminal mental state at trial render the error, if any, harmless?

—o—

STATUTES INVOLVED

In addition to those statutes set forth in the petitioner's brief, this case involves section 94-2-105 (2), R. C. M. 1947, which provides:

> *Causal relationship between conduct and result.*
>
> (1) Conduct is the cause of a result if:

(a) without the conduct the result would not have occurred; and

(b) any additional causal requirements imposed by the specific statute defining the offense are satisfied.

(2) If purposely or knowingly causing a result is an element of an offense, and the result is not within the contemplation or purpose of the offender, either element can nevertheless be established if:

(a) the result differs from that contemplated only in the respect that a different person or different property is affected, or that the injury or harm caused is less than contemplated; or

(b) the result involves the same kind of harm or injury as contemplated but the precise harm or injury was different or occurred in a different way, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

(3) If negligently causing a particular result is an element of an offense, and the result is not within the risk of which the offender is aware, or should be aware, either element can nevertheless be established if:

(a) the actual result differs from the probable result only in the respect that a different person or different property is affected, or that the actual injury or harm is less; or

(b) the actual result involves the same kind of injury or harm as the probable result, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

SUMMARY OF THE ARGUMENT

The respondent, as an initial matter, requests this Court to reconsider its grant of a Writ of Certiorari, or in the alternative to affirm petitioner's conviction of deliberate homicide because error, of any, was harmless beyond a reasonable doubt. The State was not required to prove that petitioner specifically intended the death of his victim. It was sufficient that he committed the homicide knowingly, i.e., that he was aware of the high probability that death would result from his attack. Sections 94-2-101(27), 94-5-102 and 94-5-105(2), R. C. M. 1947, and see *State v. McKenzie*, 581 P. 2d 1205, 1232 (Mont. 1978). Petitioner's confession, which was reaffirmed as accurate in defense counsel's statement and his own experts' testimony unequivocally stated that petitioner caused the death with the intent to inflict severe injury knowing his actions would probably result in her death. Therefore, even if the instruction was error, the error was harmless. The Writ should be dismissed as improvidently granted.

The challenged presumption originated in the common law, and is no more and no less than common sense and experience. It simply allows the jury to look at facts and circumstances of the crime as well as the accused's version in determining his state of mind. The presumption did not shift to petitioner the burden of persuasion with respect to any element of the offense charged or relieve the prosecution of its burden of proving all elements beyond a reasonable doubt. At most, it placed a burden of production on the petitioner. *State v. Sandstrom*, — Mont. —, 580 P. 2d 106 (1978). The presumption has the same form and effect as the inference in *Barnes v. United States*, 412 U. S.

837 (1973), and does not allow the jury to presume one element of the offense from proof of the other elements.

ARGUMENT

I.

The petition should be dismissed because the defendant admitted all of the elements of the crime charged: error, if any, in giving an instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" was harmless beyond a reasonable doubt.

Although the Court has already granted a Writ of Certiorari in the present case, the respondent urges the Court to reconsider its grant of the Writ, or in the alternative to affirm petitioner's conviction. Petitioner's confession, which he expressly reaffirmed during trial, and the testimony of a psychiatrist and a psychologist on petitioner's behalf admit without contradiction the existence of the essential elements of the crime of deliberate homicide.

The crime of "deliberate homicide" is defined in section 94-5-102, R. C. M. 1947, which was enacted in 1973 as a part of the "Montana Criminal Code."[1] The Criminal

1 Subsequent to the decision of the Montana Supreme Court in the case below, *State v. Sandstrom*, 580 P. 2d 106 (1978), the Montana legislature recodified the statutes of Montana, supplanting the 1947 Revised Codes of Montana (hereinafter designated as R. C. M. 1947) with the Montana Code Annotated (Mont. Code Annot.). The recodification was ef-

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Code abolishes definitions of mental states historically associated with criminal culpability, substituting more understandable and straightforward concepts. One of the stated purposes of the Code was to do away with the ill defined and nebulous terms traditionally describing criminal mental states:

> A major problem of prior Montana criminal law was the use on the code of numerous terms affecting culpability that were largely undefined. Under the new Code, the mental states required for various degrees of culpability are defined carefully in a heirarchy. • • •

Annotator's Notes, Montana Criminal Code 1973, Annot. at 73. With respect to homicide, the common law mental states of premeditation, deliberation and malice aforethought have been abandoned. Annotator's Notes, Montana Criminal Code 1973, Annot. at 115. Under the new Criminal Code, "A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being."[2] Section 94-5-101 (1),

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fective January 1979. (Montana Legislature, House Bill 1.) The following is a cross-reference of pertinent sections herein: For the purposes of this case respondent will continue to use Revised Codes of Montana section numbers.

Revised Codes of Montana	Montana Codes Annotated
94-2-101 (27)	45-2-101 (27)
94-2-101 (52)	45-2-101 (52)
94-2-105 (2)	45-2-105 (2)
94-5-101 (1)	45-5-101
94-5-102	45-5-102
94-5-103	45-5-103

2 Section 94-5-101 (1), R. C. M. 1947:
Criminal homicide. A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being.

R. C. M. 1947. Criminal homicide constitutes deliberate homicide if, "it is committed *purposely or knowingly*, . . ."[3] Section 94-5-102, R. C. M. 1947. The requisite mental state for deliberate homicide under Montana law is phrased in the alternative. The death may be caused purposely *or knowingly*. "Purposely" is defined by section 94-2-101 (52), R. C. M. 1947:

> A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result.

"Knowingly" is defined by section 94-2-101(27), R. C. M. 1947:

> A person acts knowingly with respect to conduct or to a cirmcumstance described by statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct.

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3 Section 94-5-102, R. C. M. 1947:

Deliberate homicide. (1) Except as provided in 94-5-103 (1) (a), criminal homicide constitutes deliberate homicide if:

(a) it is committed purposely or knowingly; or

(b) it is committed while the offender is engaged in or is an accomplice in the commission of, an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnapping, felonious escape, or any other felony which involves the use or threat of physical force or violence against any individual.

If the homicide is committed "purposely and knowingly" but "under the influence of extreme mental or emotional distress for which there is reasonable explanation or excuse," the crime is reduced to mitigated deliberate homicide. Section 94-5-103, R. C. M. 1947.

A defendant need not intend the death of his victim; it is sufficient that he was aware that it was highly probably that his actions would result in the death of another human being. Thus, in *State v. McKenzie*, 581 P. 2d 1205, 1231-1232 (Mont. 1978), the Montana Supreme Court generally described the requisite mental state for deliberate homicide as follows:

> The prescribed mental state of "purposely or knowingly" applies to each element of the crime of deliberate homicide, Section 94-2-103 (1) and (2), R. C. M. 1947. To be guilty of deliberate homicide, therefore, one must *either* have the purpose to kill *or know that it was highly probable that his actions would result in the death of another human being.*
>
> * * *
>
> In Montana a person commits the offense of deliberate homicide if he purposely or knowingly causes the death of another human being. Sections 94-5-102 (1) (a), 94-5-101 (1), R. C. M. 1947. The statutorily defined elements of the offense, each of which the State must prove beyond a reasonable doubt, are therefore causing the death of another human being with the knowledge that you are causing or with the purpose to cause the death of that human being. *A person acts "with knowledge" or "knowingly" " * * * with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct.* * * "* Section 94-2-101 (27), R. C. M. 1947. (Emphasis added.)[4]

Petitioner in his quotation of *McKenzie* at p. 13 of his brief has omitted the italicized language.

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4 But see note 6, infra.

Petitioner's argument in the present case derails in its exclusive focus on the mental state of "purposely" and its complete disregard of the alternative mental state of "knowingly." His arguments are predicated upon an assertion that petitioner did not have the "specific intent" to kill the deceased, Annie Jessen.

In his opening statement to the jury (App. 6) petitioner's attorney told the jury that petitioner admitted the facts stated in his prior confession. (App. 10). In that confession, petitioner admits he purposely and intentionally struck and stabbed the deceased:

> I got worried that someone would hear her so I picked up the shovel and hit her with it. I hit her in the back of the head. I thought it would stop her screaming, but it never. I couldn't understand what she was screaming about.
>
> She started to wheel her wheelchair and I got scared and didn't know what to do. There was a knife laying up on the counter, so I grabbed that and stabbed her. I stabbed her in the back five times. The knife went through the back of the wheelchair. She quit moving around and there was blood all over the place.

The thrust of his defense was that he only intended to silence her, not to kill her.[5]

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5 In opening argument, defense counsel informed the jury that defendant would demonstrate that he took the life of Mrs. Jessen "impulsively", without planning or deliberation. (App. 6-8.) He closed by requesting:

* * *

> I will ask of you at that time to look at the consequences and return a verdict of not guilty of deliberate homicide requested by the prosecutor *but a verdict of mitigated homicide based on the position that the de-*

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Petitioner's evidence as to his state of mind consisted of the testimony of a psychiatrist and a psychologist. That testimony, along with petitioner's confession, may be fairly characterized as raising an issue as to whether he specifically intended Annie Jessen's death. However, that same confession and expert testimony established without contradiction that while beating and stabbing Annie Jessen he was aware of the high probability that his victim would die as the consequence of his attack.

Dr. William Stratford, a psychiatrist, testifying on defendant's behalf, was asked if he had an opinion concerning whether petitioner "deliberated" as to the death of the deceased. The doctor responded:

> I understand the question, I am not sure of the context when you are using the word deliberation. If you use it in the sense that it was planned, I don't think that it was planned to cause her death. *If you are using the term deliberation to indicate that he perhaps*

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> *fendant did not act with knowledge or purpose in taking Mrs. Jessen's life.* Thank you. (App. 8.) (Emphasis added.)

The closing request was reflected in jury instruction No. 13 (App. 37) wherein the court instructed:

> If you are convinced beyond a reasonable doubt that the defendant, David Sandstrom, caused the death of Annie Jessen on November 1, 1976, in Deer Lodge County, Montana, but you are not convinced beyond a reasonable doubt that the defendant caused the death of Annie Jessen purposely or knowingly, then you should find the defendant guilty of mitigated deliberate homicide.

The instruction was erroneous. "Purposely or knowingly" is an element of *both* deliberate and mitigated deliberate homicide. Sections 94-5-102 and 94-5-103, R. C. M. 1947, and see *Patterson v. New York*, 432 U. S. 197, 206-207 (1977). However, in convicting petitioner of deliberate homicide, the jury implicitly rejected petitioner's assertion that he did not act "purposely or knowingly."

> *purposely inflicted damage upon her in the deliberate sense, using the word in that context, I think that is true, he did deliberately do that. He did deliberately harm her.* (Emphasis added.)

(App. 16.) The doctor was then asked, "Do you believe that he formed the intent to take her life?" The answer was, "In my opinion his intention was to silence Mrs. Jessen." Following that same line of questioning, petitioner's attorney asked, "And you believe his intention was to stop her from screaming?" His answer was, "Yes." (App. 17.) The doctor later reiterated his opinion:

> And I think in my opinion that when he was confronted with her presence and confronted with the screaming that his intention was at that point to silence Mrs. Jessen *and when he was unable to do so with the shovel, pursued the course of events.* (Emphasis added.)

(App. 17.) On cross-examination the doctor further delimited his opinion of petitioner's mental state:

> In my opinion he purposely hit her with the shovel first and he purposely picked up the knife and *he* purposely inflicted the stab wounds on Mrs. Jessen.

(App. 20.) Defendant's other expert witness, Dr. Nash, a psychologist, testified:

> In my opinion he did not anticipate or plan the death of Mrs. Jessen. He was in the reacting—at the time of the offense I believe his mental condition could best be described as a condition of—a range of frustration and anger and that he was trying to prevent her from screaming and that if that had occurred at some earlier stage he may not have gone any further, *but that he took increasingly more severe steps to try to stop her from screaming and then that ultimately brought her to her death.* (Emphasis added.)

(App. 27.)

Finally, both Dr. Stratford and Dr. Nash testified concerning the petitioner's awareness of the consequences of his acts. Dr. Stratford testified:

> In my opinion he did—he did not intend to kill her, *but that he was aware of the fact that the instruments that he utilized were capable of causing her death.* (Emphasis added.)

(App. 21.)

Dr. Nash, in a response to the prosecutor's questions, testified:

> Q. And did he have the capacity to know when he picked up the shovel that hitting Mrs. Jessen would harm her?
>
> A. Yes.
>
> Q. When he began stabbing Mrs. Jessen, did he have the capacity to know that stabbing her could result in her death?
>
> A. I believe he had the basic capacity to do so.
>
> Q. To know that this would be the result?
>
> A. Yes.

(App. 31-32.) In summary, in attempting to show that he did not specifically intend Annie Jessen's death, petitioner affirmatively established that he was aware of the high probability that his actions would cause the death of Annie Jessen. Petitioner's version of the crime amounts to a confession—that he "knowingly" caused the death of Annie Jessen.[6] By the time the jury was instructed, the

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6 Deliberate homicide could have been established even if the petitioner was unaware of the high probability that his

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petitioner has already admitted the existence of all of the elements required to prove that petitioner "knowingly" caused the death of Annie Jessen. Thus, even if the instruction that, "The law presumes that a person intends the ordinary consequences of his voluntary acts," was error, the error was harmless.

Respondent acknowledges that it carries a heavy burden in showing that error, if any, was harmless. See *Chapman v. California,* 386 U. S. 18, 24, rehearing denied, 386 U. S. 987 (1967). Nonetheless, not every "departure from constitutional procedures should result in an automatic reversal . . ." *Harrington v. California,* 395 U. S. 250, 254 (1969); and *Chapman,* 22. Evidence of guilt in a particular case may be so "overwhelming" and "cumulative", *Harrington v. California,* 254; *Schneble v. Florida,* 405 U. S. 427, 430 (1972); or so "cumulative", "overwhelmingly" and "largely uncontroverted", *Brown v. United States,* 411 U. S. 223, 231 (1973), that it compels a conclusion that there was no reasonable possibility that the error affected the outcome of the trial, see *Chapman,*

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action would cause Mrs. Jessen's death or was aware of the high probability that his acts would inflict serious bodily injury on Mrs. Jessen. Section 95-2-105 (2), R. C. M. 1947, provides:

> If purposely or knowingly causing a result is an element of an offense, and the result is not within the contemplation or purpose of the offender, either element can nevertheless be established if:
>
> (a) * * *
>
> (b) the result involves the same kind of harm or injury as contemplated but the precise harm or injury was different or occurred in a different way, . . .

The section was not considered in *McKenzie,* quoted supra at p. 3.

24. This is one of those cases: For while petitioner focused his trial efforts upon persuading the jury that he did not specifically "intend" Annie Jessen's death, he was presenting uncontroverted evidence that he "knowingly" caused her death.

Therefore, the facts of this case do not present a justiciable federal question and the writ should be dismissed as improvidently granted. *McCarthy v. Bruner,* 323 U. S. 673 (1944), *Needelman v. United States,* 362 U. S. 600 (1960).

II.

The instruction that the law presumes that a person intends the ordinary consequences of his voluntary acts did not relieve the state of its burden of proving all elements of deliberate homicide beyond a reasonable doubt.

The presumption that a person intends the ordinary consequences of his voluntary acts is not new. Rather, it is a rule of common experience handed down through the common law from antiquity. Greenleaf asserts that the presumption is found in the Mosaic code in the form that intent to murder is inferred from the deliberate use of a deadly weapon. 1 *Greenleaf On Evidence,* 16th Ed., § 13, p. 113 (1899). The rule is nothing more than a restatement of human experience and common sense. Thayer describes this application of common sense to law:

> Many facts and groups of facts often recur, and when a body of men with a continuous tradition has carried on for some length of time this process of reasoning upon facts that often repeat themselves, they cut

> short the process and law down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them.

Thayer, *A Preliminary Treatise on Evidence,* p. 326 (1898).

The reasons for applying this maxim to the criminal law is obvious:

> I do not think the rule in question is really a rule of law, further or otherwise than as it is a rule of common sense. The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct.

Vol. 2, Stephen, *History of Criminal Law of England,* p. 111 (1883).

In other words, the rule is one of a logical probability from the usual course of events. Clark and Marshall, *Crimes,* p. 243, § 5.03 (6th Ed. 1958). Thayer thought such presumptions not to be even part of the law of evidence:

> In whatever form they are made or ought to be made, their character is the same, that of general maxims and legal reasoning, having no peculiar relation to the law of evidence.

Thayer, supra, p. 335.

This presumption is related to a recurring problem of the criminal justice system, specifically the frequent confusion of motive and intent. Stephen believed the existence of the presumption is explained by the distinction between intention and motive:

> It is very common to say that a man's intentions were good when it is meant that his motives were good, and argue that his intention was not what it really was, because the motive which lead him to act as he did was the prevailing feeling in his mind at the time when he acted rather than the desire to produce the particular result which his conduct was intended to produce. This confusion of ideas not unfrequently leads to failures of justice.

Stephen, supra, 110. Evidentiary scholars hold that the presumption prevents an accused from using his ultimate motive to relieve himself of the immediate intent of his acts.

> Notwithstanding the compelling force of the reason underlying this presumption, it has often been subjected to criticism which has challenged its necessity. But it has withstood the attacks, safe on its foundation of authority and public policy. It will readily be seen that were no such presumption raised, crime would still more often go unwhipped of justice, and the criminal could carry his "I don't mean it" as a safe and certain talisman to keep him immune from the consequences of his misdemeanor.

1 *Jones On Evidence*, § 130, p. 211 (2nd Ed., 1926).

In other words, the presumption is utilized to tell the jury it does not have to accept the defendant's version as to his state of mind but that it may also look to defendant's acts and the facts and circumstances of the crime to deduce or infer his state of mind.

This Court in following the 19th century scholars has invoked the application of the presumption on several occasions. *Radio Officers v. Labor Board*, 347 U. S. 17, 45 (1953), *Cramer v. United States*, 325 U. S. 1, 31 (1944), *Agnew v. United States*, 165 U. S. 36, 50 (1897); *Reynolds v. United States*, 98 U. S. 244 (1878).

A. The presumption as used in the case below placed a burden of production on the petitioner.

Petitioner asserts that the presumption relieves the state of its burden of proving the requisite mental state of deliberate homicide beyond a reasonable doubt, citing *In re Winship*, 397 U. S. 358 (1970), *Mullaney v. Wilbur*, 421 U. S. 684 (1975), and *Patterson v. New York*, 432 U. S. 197 (1977). Crucial to petitioner's contention is his characterization of the effect of the jury instruction. Contrary to his position, the Montana Supreme Court found, and respondent submits, that the use of the presumption in this case does not relieve the state of proving all the elements of the crime charged beyond a reasonable doubt. Rule 301 (b) (2) of The Montana Rules of Evidence provide that a disputable presumption must be overcome by a preponderance of evidence. Petitioner argues this was the burden placed on him by the instruction. However, the jury was given no instructions describing or defining the effect of presumption. The presumption was given in a simple one sentence statement without further explanation. Statutory provisions and rules of court defining the applications and limitations of presumptions and inferences have no application to the inquiry. The question is presented, what is the effect of the presumption when the jury is not given direction with regard to its use?

Initially, the effect of presumptions is not without doubt or controversy. "[L]egal presumptions involve subtle conceptions to which not even judges always bring clear understanding." *Bollenbach v. United States*, 326 U. S. 607, 614 (1946). The term "presumption" has been

subject to divergent definitions and applications,[7] as can be particularly illustrated in the case of the presumption that the law presumes that a person intends the ordinary consequences of his voluntary acts. That presumption has been used in connection with determining whether a prima facia case has been established.[8] It has also been used to supply by implication an allegation.

More specifically, in the context of the present case, courts have differed as to the effect of the presumption when given as a jury instruction without further explanations as to its use by the jury. State courts have reached conclusions as diverse as the locations of the courts.

The Alabama Supreme Court concludes that the instruction is misleading in that the jury could believe that the occurrence of the particular facts giving rise to the presumption shifts the burden of proof of knowledge or intent. *Hall v. State*, 49 Ala. 381, 272 S. 2d 590 (1973). The Washington court holds that when the operation of the presumption is not qualified it has the effect of requiring the defendant, by some unexplained standard of proof, to refute the presumption. (This unexplained standard is characterized as more than a shifting of the burden of production.) *State v. Roberts*, 88 Wash. 2d 337, 562 P. 1259 (1977). The Kansas court holds the unqualified presumption has a conclusive effect and required that the jury be

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7 See generally Thayer, supra, ch. 8-9; Wigmore, Evidence (3rd Ed., 1940) §§ 2490-2540; Morgan, Some Observations Concerning Presumptions (1931), 44 Harv. L. Rev. 906; Denning, Presumptions and Burdens, (1945) 61 L. Q. Rev. 379.

8 E. g., *State v. Walker*, 35 N. C. App. 182, 241 S. E. 2d 89, 921 (1978); *State v. Holley*, 174 Conn. 22, 381 A. 2d 539, 541 (1977).

instructed that the presumption can be overcome by contrary evidence. *State v. Warbritton*, 211 Kan. 506, 506 P. 2d 1152 (1973).

On the other hand, the Arizona court finds the unqualified presumption to be nothing more than a prima facia inference which shifts the burden of production to the defendant. *State v. Preis*, 89 Ariz. 336, 362 P. 2d 660 (1961). Arizona's position is supported by courts of other states, including the courts of Washington and Kansas, which hold that if other instructions clearly indicate the burden of proof is on the prosecution to prove every element beyond a reasonable doubt, the unqualified instruction does not shift any burden of proof to the defendant. *State v. Vandiver*, 584 P. 2d 978 (Wash. 1978); *State v. Warbritten*, supra; *Bishop v. People*, 165 Colo. 423, 439 P. 2d 342 (1968); *Cullin v. State*, 565 P. 2d 445 (Wyo., 1977); and cf. *Patterson v. State*, 239 Ga. 409, 238 S. E. 2d 2 (1977); *Turner v. United States*, 396 U. S. 489, 406 (1970).

The Montana Supreme Court has adopted the latter position in its decision below, finding the unqualified instruction to shift *only* the burden of production. It said:

> Defendant's sole burden under instruction No. 5 was to produce some evidence that he did not intend the ordinary consequences of his voluntary acts, not to disprove that he acted "purposely" or "knowingly".

By so ruling, the Montana court adopted the interpretation of the presumption espoused by Stephen, Jones and Thayer.

B. The presumption in this case comports with the due process standards under Barnes v. United States.

Petitioner's reliance on *Winship*, *Mullaney* and *Patterson* is misplaced. *Mullaney* precludes the use of a presumption which establishes one element of an offense after the jury finds the other elements to exist. In other words, it precludes the use of an elemental presumption which shifts the burden of persuasion to the defendant to disprove the element so established.

The presumption in this case differs. It is an evidentiary presumption and does not arise automatically on the finding of the other elements of the offense. Rather, the presumption comes into use only after, the jury is satisfied as to the existence of the additional certain preliminary fact that the result (death) is an "ordinary consequence" of the act.

Further, the presumption did not place a burden of persuasion of the petition, but merely shifts the burden of production. The burden of proving all the elements remains on the prosecution. The presumption is of the same effect as the inference approved in *Barnes v. United States*, 412 U. S. 837 (1973). Compare *Turner v. United States*, supra, 396 U. S. 489 (1970); *United States v. Gainey*, 380 U. S. 63 (1965).

The jury instruction considered in *Barnes* was to the effect that from unexplained possession of recently stolen property the jury could infer knowledge that the property was stolen. *Barnes*, 839. The instruction was a traditional common law inference transported from England and infused into the American criminal system. *Barnes*, 843-844. It has consistent and longstanding judicial approval. *Barnes*, 844. In passing upon the constitutionality of the inference the Court used the test long ago established by the common law theoreticians:

> The evidence established that petitioner possessed recently stolen treasury checks payable to persons he did not know, and it provided no plausible explanation for such possession consistent with innocence. On the basis of this experience alone *common sense and experience* tells us that petitioner must have known or been aware of the high probability that the checks were stolen. (Citations omitted.) (Emphasis added.)

Applying this common sense and experience test and relying on the long established use of the common law inference, the inference was found to comport with due process because the jury could find beyond a reasonable doubt upon the evidence that the accused knew the property was stolen. *Barnes,* 845.

The presumption is here strikingly similar in both form and effect to the inference in *Barnes.* Both allow an inference as to state of mind to be drawn from the facts and circumstances. Both are derived from the common law and have long standing judicial approval. Both are an embodiment of common sense and experience. Both expressly recognize normal and ordinary probabilities of human conduct, and permit a jury to employ that recognition in reaching a verdict. Both are procedural devices permitting the trier of fact to conclude that the prosecution has met its burden of proof with respect to the presumed or inferred fact by having satisfactorily established other facts. *Mullaney,* 703, N. 31.

Barnes was the culmination of a line of cases dealing with presumptions under the due process clause. The recent cases of *In re Winship* and its progeny; *Mullaney v. Wilbur* and *Patterson v. New York* do not undermine

the holdings of *Barnes* and its ancestors. *Mullaney* explicitly recognized the continuing vitality of *Barnes. Mullaney,* 703, N. 31.

C. The instructions as a whole required the state to prove all elements beyond a reasonable doubt.

Jury instructions must be reviewed as a cohesive whole rather than in dismembered isolation under the cold microscopic lens. *Cupp v. Naughten,* 414 U. S. 141, 146 (1973).

The jury in the present case was instructed that: before they could convict they had to be convinced beyond a reasonable doubt that the defendant caused the death of the deceased purposely or knowingly (Inst. 3, App. 34); the accused is presumed innocent until proven guilty beyond a reasonable doubt and this presumption continues until overcome by competent evidence which displaces any reasonable doubt of guilt (Inst. 4, App. 35); and the burden of proof rests upon the state to establish guilt beyond a reasonable doubt and a conviction is unwarranted unless the burden is sustained (Inst. 2).

Read together, the jury was clearly and unequivocally instructed that the prosecution had to establish the elements of the crime beyond a reasonable doubt.[9] *Mullaney* and *Patterson* require no more.

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9 The Federal Circuit Court cases cited by petitioner (App. 20-21) reinforce this argument. Most upheld the convictions even though the opinions disapproved of the particular instruction challenged. In fact, *United States v. Garrett,* 574 F. 2d 778 (3d Cir. 1978), cert. denied — U. S. — (1978),

(Continued on the next page)

CONCLUSION

The petitioner by his own evidence established the mental state necessary for his conviction of deliberate homicide. Any alleged error in giving the instruction is thereby rendered harmless. The instruction was found by the Montana Supreme Court to have the same form and effect as the inference in *Barnes* and under that ruling has the same effect subscribed to it by the common law scholars. The ruling in *Mullaney* is not applicable. The instruction was properly given and respondent, State of Montana, respectfully requests the writ be dismissed.

Respectfully submitted this 24th day of March 1979.

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affirmed the defendant's conviction because the court said other instructions given to the jury regarding the government's burden of proof cured any defect in the specific instruction challenged. See *United States v. Netterville*, 553 F. 2d 903 (1977), cert. denied 434 U. S. 1009 (1978).